International Legal Frameworks: The Status of UNMISS PoC Sites in South Sudan
February 23, 2016

I. Introduction

The armed conflict in South Sudan that originated with the outbreak of violence on 15 December 2013 has left hundreds of thousand South Sudanese uprooted. In an unprecedented development, nearly 200,000 civilians have sought the protection of the United Nations Mission in South Sudan (“UNMISS”) in one of five UNMISS Protection of Civilian sites (“UNMISS PoC sites”), where they continue to reside more than two years later.¹

This note analyses the various international legal frameworks that govern the status of the UNMISS PoC sites and those residing therein. It applies these frameworks to specific questions relating to 1) the status of UNMISS PoC sites and persons residing therein; 2) their transfer and return; 3) protection, restitution and compensation regarding their housing and property; and 4) accountability mechanisms to ensure the implementation of international law.

II. International law and its actors

International law is the body of rules that governs the conduct of, and the relations between, states, although its norms increasingly apply to other entities as well, such as non-state actors (e.g. armed opposition groups) and international organisations. Its primary sources are treaty law and customary international law; many rules of international law are grounded in both.

Treaties are written agreements between states, which are sometimes referred to as conventions, covenants, charters, pacts or protocols. Treaties are legally binding on states that have explicitly consented to be bound by them, for example through ratifying or acceding to the treaty. Most treaties do not allow non-state actors and international organisations to join them and are thus not formally binding on these entities.

Customary international law results from a general and consistent practice of states followed out of a sense of legal obligation. It is binding upon all states, unless a state has persistently objected to its application. Some rules of customary international law have attained a

peremptory character (*jus cogens*). Peremptory norms of international law may never be
derogated from and cannot be easily modified. In certain cases, rules of customary
international law, in particular those of a peremptory character, apply to non-state actors and
international organisations as well as to states.

III. International law in South Sudan

On August 27, 2015 Mr. Salva Kiir Mayardit, the head of the Government of the Republic of
South Sudan (“GRSS”) signed the Agreement on the Resolution of the Conflict in the
Republic of South Sudan (“2015 Peace Agreement”). Dr. Riek Machar, leader of the main
opposition group known as the SPLM/A in Opposition had already signed the agreement,
which lays out plans for the development of a Transitional Government of National Unity
(TGoNU) 90 days after the signature of the agreement. This date has long passed, as have
further deadlines for the establishment of TGoNU. As of February 20, 2016, the TGoNU has
not been formalized. As the relevant state actor, international law primarily binds the GRSS.
While armed opposition groups, such as the SPLM/A in Opposition may exercise control
over large parts of the territory and population of South Sudan, from the perspective of
international law they are typically considered non-state actors.

When South Sudan seceded from the Republic of Sudan to become an independent state on 9
July 2011, it did not automatically inherit the treaty obligations of the latter. International law
determines that new states start with a clean slate, unless they explicitly accept the treaty
obligations of their predecessor. South Sudan has not done so with regard to treaties directly
relevant to this report. However, South Sudan is bound by the entire body of customary
international law, including all peremptory norms of international law.

The following sections examine what rules of international law apply to the situation of the
UNMISS PoC sites and the persons residing therein. At least five different regimes of
international law are relevant in this regard. These are 1) international human rights law; 2)
international humanitarian law; 3) international criminal law; 4) international law on
displacement; and 5) UN law. While these legal regimes overlap, they do not necessarily

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3 Agreement on the Resolution of the Conflict in the Republic of South Sudan, 27 August 2015, see
   https://unmiss.unmissions.org/Portals/unmiss/Documents/agreements/IGAD%20Agreement%20on%20the%20
   Resolution%20of%20the%20Conflict%20in%20South%20Sudan%202015.pdf [accessed 26 February 2016].
4 While the Vienna Convention on the Succession of States in respect of Treaties, 1946 UNTS 3, 23 August
   1973, holds that only “newly independent states”, i.e. decolonised states enjoy a clean slate, this treaty has only
   received a limited number of ratifications and does not reflect customary international law.
5 On 11 November 2011, South Sudan did succeed to the Convention on the Prohibition of the Use, Stockpiling,
   Production and Transfer of Anti-Personnel Mines and on their Destruction; accordingly, the Convention became
effective for South Sudan on 9 July 2011. See http://www.apminebanconvention.org/en/states-parties-to-the-
   convention/south-sudan/ [accessed 13 March 2015].
6 This term is preferred over the more common reference “international refugee law”, since it has a wider scope
   and covers internally displaced persons. This note uses the term “displaced persons” to refer to both refugees
   and internally displaced persons.
conflict or displace each other. Rather, they mutually reinforce the obligations of the relevant actors to ensure the protection of civilians in times of peace and war.

1. International human rights law

International human rights law sets out rights and freedoms that every individual should enjoy. It can be found in global and regional treaties, but also in declarations, principles and guidelines issued by international organisations such as the United Nations (“UN”) or the African Union (“AU”). While the latter are not legally binding on states, they can be used to interpret the legal rights and obligations set out in treaties and can help to identify rules of customary international law, including norms of a peremptory character.

As of 20 February 2016, South Sudan had joined only three out of the ten core international human rights treaties: the 1989 Convention on the Rights of the Child (“CRC”), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”) and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”). As a general principle of international law, these treaties only apply from the moment of ratification and do not cover acts or conduct prior to South Sudan joining the treaties.

South Sudan is also party to a number of conventions adopted under the aegis of the International Labour Organisation, including the 1957 Convention concerning the Abolition of Forced Labour and the 1999 Worst Forms of Child Labour Convention. These

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9 1577 UNTS 3, ratified on 23 January 2015. South Sudan did not accede to any of the three Optional Protocols to the Convention, relating to children and armed conflict, child prostitution and a communication procedure respectively. The South Sudanese Assembly has voted to join the African Charter on the Rights and Welfare of the Child, but the government has not yet formally ratified it.
10 1249 UNTS 13, ratified on 30 April 2015 together with the 1999 CEDAW Optional Protocol.
11 1465 UNTS 85, ratified on 30 April 2015 together with the 2002 CAT Optional Protocol.
12 This is known as the principle of non-retroactivity; see Art 28 VCLT. Note, however, that many of the provisions in these treaties reflect longstanding rules of customary international law, which has bound South Sudan from its inception as a state.
13 Convention concerning the Abolition of Forced Labour (No. 105), ratified on 29 April 2012.
14 Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No. 182), ratified on 29 April 2012. South Sudan has also ratified, all on 29 April 2012, the 1930 Convention concerning Forced or Compulsory Labour (No. 29); the 1949 Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (No. 98); the 1951 Equal Remuneration Convention (No. 100); the 1958 Convention concerning Discrimination in Respect of Employment and Occupation (No. 111); and the 1973 Convention concerning Minimum Age for Admission to Employment (No. 138).
conventions ban, inter alia, the use of slavery and the recruitment of children into the armed forces.

At the regional level, South Sudan remains the only member of the African Union not to have joined the African Charter on Human and Peoples’ Rights (“ACHPR”). However, it has joined the International Conference of the Great Lakes Region (“ICGLR”) and is a party to the 2006 ICGLR Pact on Security, Stability and Development for the Great Lakes Region (“2006 ICGLR Pact”) and its Protocols. The Pact and Protocols impose legally binding human rights obligations on the government of South Sudan, particularly the Protocol on Democracy and Good Governance, the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination (“ICGLR Protocol on International Crimes”), and the Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children (“ICGLR Protocol on Sexual Violence”).

Despite South Sudan’s dearth of treaty ratifications, its government and non-state actors can be held to account to international and regional human rights standards. First, many fall within the body of international customary law. Certain human rights standards have even attained the status of peremptory norms of international law, such as the prohibition on genocide, torture, the recruitment of child soldiers, and slavery including sexual slavery.

Second, the GRSS has repeatedly pledged its commitment to international and regional human rights standards. First, it has expressed a general commitment to international human rights standards in a voluntary pledge supporting its bid for a place on the Human Rights Council. Second, it has publicly committed itself to specific standards, including rules regarding the protection of children in armed conflict and the prevention of sexual and other

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15 The Council of Ministers approved the ratification of the ACHRP in May 2013 and the National Legislative Assembly voted to ratify it in October 2013, but the presidency has not yet formally ratified the Charter; see ‘NGOs urge South Sudan to ratify African Charter’, Sudan Tribune, 16 April 2014, http://www.sudantribune.com/spip.php?article50670 [accessed 25 May 2015].

16 South Sudan was admitted as a member of the ICGLR on 24 November 2012 and signed the Pact and its Protocols on 24 February 2013. For the text of the Pact, http://www.icglr.org/images/Pact%20ICGLR%20Amended%2020122.pdf [accessed 14 May 2015].


21 Voluntary pledge of the Republic of South Sudan for candidature to the Human Rights Council, 31 October 2013. UN Doc A/68/565 Annex. South Sudan explicitly stated that its lack of ratification flows from “the young age of the Republic and its capacity to meet the requirements for accession”, not from “a lack of will to adhere to international standards.”

22 The SPLA originally signed the Action Plan on Children and Armed Conflict in 2009 and the government renewed its commitment in 2012 and 2014; see Report of the Secretary-General on South Sudan, UN Doc S/2014/708, para 56.
gender-based violence. In light of the clear and specific terms of these unilateral declarations, the GRSS can be considered legally bound to these standards.

Third, while non-state actors cannot join human rights treaties, it is increasingly recognised that they “can also be bound by international human rights law and can assume, voluntarily or not, obligations to respect, protect and fulfil human rights”, particularly where they “exercise some degree of control over a given territory and population.” The SPLM/A in Opposition has publicly committed itself to ending recruitment and other grave violations of international law against children and to prevent conflict-related sexual violence. Moreover, given its forthcoming participation in the TGoNU, it should not be held to standards less stringent than the incumbent government.

Fourth, the Cessation of Hostilities agreement signed on 23 January 2013 (“Cessation of Hostilities Agreement”) explicitly binds its parties, i.e. the GRSS and the SPLM/A in Opposition, to international human rights standards. In particular, the parties have committed themselves to cease and refrain from, among others, acts of rape, sexual abuse, torture, summary executions, attacks against children, girls, women and the elderly, recruitment of child soldiers, destruction of property and other acts prohibited by continental and international instruments. As the preamble of the agreement indicates, these obligations do not simply apply between the parties, but are owed to the people of South Sudan, to IGAD and to the international community as a whole.

Fifth, the 2015 Peace Agreement commits its signatories to inter alia a permanent ceasefire and the creation of several legal mechanisms including the Ceasefire and Transitional Security Arrangement Monitoring Mechanism (CTSAMM), the Commission for Truth, Reconciliation and Healing (CTRH), the Hybrid Court for South Sudan (HCSS), and the Compensation and Reparation Authority (CRA).

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28 Agreement on Cessation of Hostilities between the Government of the Republic of South Sudan (GRSS) and the Sudan People’s Liberation Movement/Army (in Opposition) (SPLM/A in Opposition), 23 January 2014, see http://southsudan.igad.int/attachments/article/250/cessation%20of%20hostilities.pdf [accessed 13 May 2015].

29 Ibid, Art 3.

30 See Chapter II (4) and Chapter V (2), (3) and (4) of the 2015 Peace Agreement.
2. International humanitarian law

International humanitarian law applies in armed conflicts, where it governs the means and conduct of warfare and the treatment of those not taking part in hostilities. Following the violence on 15 December 2013 South Sudan has been in a state of non-international armed conflict. The applicable rules in armed conflict of a non-international character are set out in Common Article 3 of the 1949 Geneva Conventions and their Additional Protocol II (“Additional Protocol II”), which South Sudan ratified on 25 January 2013. These rules apply to “all parties to the conflict”, including the government and non-state actors. Moreover, all parties are bound by international humanitarian law as reflected in customary international law.32

At the core of international humanitarian law lie the principles of military necessity, distinction and proportionality. Together, these principles dictate that belligerents may only engage in attacks that serve a clear military objective (i.e. that contribute to the defeat of the military enemy), that distinguish between combatants and civilians and where the harm done to civilians or civilian property is proportional and not excessive in relation to the concrete and direct military advantage sought. Acts that breach one or more of these principles constitute violations of international humanitarian law.

Common Article 3 provides that civilians, i.e. persons not taking part in hostilities, shall be treated humanely and shall not be subject to violence to life and person, including murder and torture; the taking of hostages; outrages upon personal dignity; and arbitrary or extra-judicial executions. Additional Protocol II reiterates these protections and explicitly prohibits attacks on civilian populations and individual civilians; on objects indispensable to their survival; on works or installations that contain dangerous forces, such as dams, dykes and nuclear installations; and on cultural objects and places of worship. It also prohibits forced movement or displacement of civilians.

The Security Council has adopted a wide range of resolutions emphasising the importance of the protection of civilians, women and children in armed conflict. Moreover, it has frequently condemned the use of sexual violence as a method of warfare. While these resolutions themselves are not legally binding on UN member states, the GRSS has

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32 For a detailed compilation of customary IHL, see https://www.icrc.org/customary-ihl/eng/docs/home [accessed 14 May 2015].
undertaken to uphold at least some of them.³⁷ Moreover, the resolutions reiterate the customary character of the applicable rules and inform UN policy in this regard.

3. International criminal law

Where international human rights law and international humanitarian law primarily impose obligations upon institutional actors, such as states and non-state actors, under international criminal law individual perpetrators, their commanders and other superiors³⁸ may be held personally responsible for gross violations or abuses of international law.

Violations or abuses of international human rights law that are part of a widespread or systematic attack directed against any civilian population constitute crimes against humanity.³⁹ In turn, grave breaches of the rules and customs applicable in non-international armed conflict constitute war crimes.⁴⁰ Given the peremptory character of the prohibitions on crimes against humanity and war crimes, they apply to all actors in the conflict.

4. International law on displacement

The international law on displacement covers both refugees and internally displaced persons, though different legal regimes apply these two categories. Refugees are defined in the 1951 Convention on the Status of Refugees,⁴¹ its 1967 Protocol⁴² and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa⁴³ as persons residing outside their country of nationality owing to a well-founded fear for persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. They do not cover persons who are internally displaced by reason of armed conflict or human rights abuses. South Sudan is not party to either of these conventions, although the Council of Ministers has submitted the OAU Convention for ratification to the National Legislative Assembly.

However, these treaties are relevant to the extent that they reflect the customary international law principle of non-refoulement. This principle prohibits the expulsion or return of a person where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion. The prohibition can also be found in international human rights law,⁴⁴ international humanitarian law and UN policy.⁴⁵ As a result, it applies not just to refugees but to everyone, including IDPs, and binds all actors in South Sudan, including UNMISS.

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³⁹ See e.g. Art 7 and 28 of the Rome Statute.
⁴⁰ See Art 8 and 28 of the Rome Statute
⁴¹ 189 UNTS 137.
⁴² 606 UNTS 267.
⁴³ 1001 UNTS 45.
⁴⁴ Art 45 of the Fourth Geneva Convention.
Internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border.\(^{46}\) The principal international norms applicable to them are set out in the 1998 Guiding Principles on Internal Displacement (“Guiding Principles”),\(^{47}\) and the 2005 Principles on Housing and Property Restitution for Refugees and Displaced Persons (“Pinheiro Principles”).\(^{48}\) While these documents are not themselves legally binding, they are widely regarded as authoritative and reflect many binding rules of international human rights law and international humanitarian law.\(^{49}\) As a result, they should be observed by all actors in South Sudan.\(^{50}\)

At the regional level, South Sudan is a party to the 2006 ICGLR Pact and its Protocol on the Protection and Assistance to Internally Displaced Persons (“ICGLR Protocol on IDPs”),\(^{51}\) and the 2006 ICGLR Protocol on Property Rights of Returning Persons (“ICGLR Protocol on Property Rights”).\(^{52}\) Apart from setting out binding regional norms regarding situations of displacement, these Protocols oblige South Sudan to adhere to, adopt and implement into national legislation the Guiding Principles,\(^{53}\) as well as to take into account the Pinheiro Principles.\(^{54}\)

South Sudan signed the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (“Kampala Convention”),\(^{55}\) on 24 January 2013. While the Convention is not formally binding on South Sudan until it has formally ratified it, international law places on treaty signatories the obligation to refrain from acts which would defeat the object and purpose of the treaty prior to ratification.\(^{56}\) The Kampala Convention contains specific obligations for non-state actors, \textit{inter alia} prohibiting them from arbitrarily displacing persons, hampering relief efforts and recruiting or enslaving women and children.\(^{57}\)

\textbf{5. UN law}


\(^{47}\) Guiding Principles, above note 44.


\(^{49}\) See GA Res 60/1 (World Summit Outcome), 16 September 2005, para 132.

\(^{50}\) See Principle 2 Guiding Principles; Principle 1 Pinheiro Principles.

\(^{51}\) See https://www.refworld.org/pdfid/52384fe44.pdf [accessed 14 May 2015].


\(^{53}\) Art 12 Pact; Art 4(1)(a) and 6(1)-(5) ICGLR Protocol on IDPs.

\(^{54}\) Art 3(3) ICGLR Protocol on Protection of Property of IDPs.


\(^{56}\) Art 18 VCLT, which is generally considered to reflect customary international law.

\(^{57}\) See Art 7(3) Kampala Convention.
While UNMISS is not a party to the armed conflict, its mandate and role to protect the thousands of civilians residing on its premises pose novel legal challenges that may affect future UN peacekeeping missions. For this reason, it is worthwhile to consider the legal framework applicable to UNMISS’ operations. As an international organisation, the UN and its organs, including UNMISS, are not party to or formally bound by the treaties listed above. Moreover, it remains unclear to what extent they are bound by customary international law, although, at a minimum, UN operations must respect peremptory norms of international law (jus cogens). Instead, the rules applicable to UNMISS can be derived from the UN Charter, UN policies, the Status-of-Forces Agreement (SOFA) and UNMISS’ mandate.

The relations between UNMISS and the GRSS are principally governed by the SOFA signed by the two parties on 8 August 2011.58 Most significantly, the SOFA sets out the privileges and immunities of UNMISS, both of the civilian and the military component. While South Sudan is not a party to the 1946 Convention on the Privileges and Immunities of the United Nations (“1946 General Convention”),59 the SOFA provides that its provisions apply to UNMISS, its property, funds, assets and its members.60 In essence, this means that UNMISS premises are inviolable and that all UNMISS members, including locally recruited personnel, enjoy immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity.61 Non-state actors are not formally bound by the SOFA, although the UN has occasionally made ad hoc security arrangements with entities other than states.62

A range of UN instruments guide UNMISS’ operations. First, UNMISS is bound to uphold the purposes and principles set out in the United Nations Charter.63 The Charter inspires the basic principles of peacekeeping, namely consent, impartiality and non-use of force except in self-defence or in defence of the mandate,64 as well as a commitment to “promoting and encouraging respect for human rights and fundamental freedoms”.65 Second, the UN has adopted a range of policies to ensure its compliance with international human rights standards, such as the Human Rights Due Diligence Policy on United Nations Support to non-United Nations Security Forces (“HRDDP”, see below),66 a Policy on Human Rights in UN Peace Operations and Political Missions and a Policy on Human Rights Screening of United Nations Personnel.67 Third, the UN has committed itself to upholding the basic

60 Para 3 SOFA; para 1(f) provides that South Sudan “intends to become a party” to the General Convention.
61 This should not be confused with diplomatic immunity, which also applies to private and criminal acts. As head of mission, only the Special Representative of the Secretary-General (“SRSG”) enjoys full diplomatic immunity. See also section IV.4.iii on accountability of individual UNMISS members.
62 Examples include arrangements with Hezbollah in Lebanon, Aideed’s forces in Somalia and ethnic leaders in Bosnia, often taking the shape of an exchange of letters or a memorandum of understanding.
63 Art 1 and 2, Charter of the United Nations.
67 Neither of these policies seem publicly available.
principles of international humanitarian law in all operations involving UN forces. More specifically, the UNMISS SOFA provides that UNMISS must conduct its operation in South Sudan with full respect for the principles and rules of the international conventions applicable to the conduct of military personnel, including the 1949 Geneva Conventions and their Additional Protocols. Fourth, UNMISS is bound by its mandate, which authorises it to use “all necessary means” to “protect civilians under threat of physical violence, irrespective of the source of such violence”.

As the UN’s most significant public commitment to upholding human rights, the HRDDP prescribes that UN entities, including UNMISS, cannot provide support “where there are substantial grounds for believing there is a real risk of the receiving entities committing grave violations of international humanitarian, human rights or refugee law and where the relevant authorities fail to take the necessary corrective or mitigating measures.” Moreover, where UN entities receive reliable information that such violations are being committed by a recipient of UN support they must intercede with the relevant authorities with a view of bringing those violations to an end. If the violations persist, they must suspend support to the offending elements.

In terms of UNMISS’ responsibilities, protection of civilians (PoC) mandates operate on three tiers. The first tier concerns protection through dialogue and engagement, which UNMISS’ mandate translates into providing “good offices, confidence-building, and facilitation in support of the mission’s protection strategy, especially in regard to women and children, including to facilitate the prevention, mitigation and resolution of inter-communal conflict in order to foster sustainable local and national reconciliation as an essential part of preventing violence and long-term State-building activity;”. The broad language leaves UNMISS with significant discretion in deciding how to fulfil this task.

Under the second tier, provision of physical protection, UNMISS is tasked to “protect civilians under threat of physical violence, irrespective of the source of such violence”. While UNMISS has a special responsibility to “maintain public safety and security within and

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69 Para 6(2) SOFA.
70 SC Res 2155 (2014), 27 May 2014 and SC Res 2187 (2014), 25 November 2014. UNMISS’ initial mandate focused on support for the government, while also tasking UNMISS with “protecting civilians under imminent threat of physical violence, in particular when the Government of the Republic of South Sudan is not providing such security”; see SC Res 1996 (2011), 8 July 2011. Following the outbreak of violence on 15 December 2013, the Security Council removed the reference to “imminent threat” and make the protection of civilians the top priority of UNMISS.
71 See above note 65, para 1.
72 For example, while UNMISS is mandated engage in operational coordination with national police services to foster a secure environment for the eventual safe and voluntary return of displaced persons, it must cease such cooperation if it finds that the police is engaged in or failing to prevent grave human rights violations of returnees; see SC Res 2187 (2014), operative paragraph 4(a)(vi).
75 Ibid, operative para 4(a)(i).
of UNMISS protection of civilians sites”, it is also tasked to protect civilians and “deter violence against civilians, including foreign nationals” outside UNMISS PoC sites.76

Tier three relates to the establishment of a protective environment. In terms of the UNMISS mandate, this includes implementing “a mission-wide early warning strategy” and fostering “a secure environment for the eventual safe and voluntary return of internally-displaced persons (IDPs) and refugees”.77 It tasks UNMISS to ensure the maintenance of international human rights standards and other standards under national and international law throughout the country. Just as under tier one, UNMISS enjoys significant discretion in the fulfilment of this part of its mandate, although it must respect the HRDDP and other UN policies in all its operations.

IV. International law and UNMISS PoC sites78

Just as anyone else in South Sudan, displaced persons and groups enjoy all rights and protections flowing from the international legal framework set out above.79 International law vests the primary responsibility for the protection of displaced persons with the GRSS,80 but this does not relieve non-state actors and UNMISS from their responsibility to respect and uphold international law. In the fulfilment of their obligations, all actors must refrain from discrimination of any kind.81

The following sections set out specific rights and responsibilities of those involved in relation to 1) the UNMISS PoC sites and persons residing therein; 2) the transfer and return of these persons; 3) restitution and compensation for loss of or damage to housing and property; and 4) accountability mechanisms.

1. Status of UNMISS PoC sites and persons residing therein

All parties to the conflict are obliged to respect and uphold the civilian, humanitarian and inviolable character of UNMISS PoC sites. In light of its mandate, UNMISS has a special duty to protect the safety and security of the persons residing in UNMISS PoC sites, which includes responding to both internal disturbances and external threats. Principal responsibility for the implementation of this mandate lies with the Special Representative of the Secretary-General (“SRSG”).

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76 Ibid, operative paragraph 4(ii) and (iv). See also Human Rights Watch, South Sudan’s New War: Abuses by Government and Opposition Forces (2014) p 77.
77 SC Res 2252 (2015) OP 4(a)(iii) and (vi) respectively.
78 The sources of legally binding rights and obligations in this section are set out in the footnotes. Sources following “see” or “see also” are not themselves legally binding, but may reflect customary international law.
79 Art 4(1)(a) ICGLR Protocol on IDPs. See also Art 3(1)(c)-(f) Kampala Convention; Principle 1 Guiding Principles.
80 Article 3(3) ICGLR Protocol on IDPs. See also Article 5(1) Kampala Convention; Principle 3 and 25(1) Guiding Principles.
81 Art 3(1)(c)-(d) ICGLR Protocol on Property Rights; Art 1 and 5(1) ICGLR Protocol on International Crimes. See also Art 9(1)(a) Kampala Convention; Principle 4(1) Guiding Principles; Principle 3 Pinheiro Principles.
International human rights law compels the GRSS to ensure a safe location for displaced persons, protected from violence and with satisfactory conditions of hygiene, water, food and shelter. Displaced persons should also be allowed to exercise their civic and political rights, such as the right to vote and to participate in community affairs. The GRSS has a special responsibility towards vulnerable groups, including women and children. In particular, it must prevent persons under the age of 15 from taking direct part in hostilities and must refrain from recruiting them in their armed forces. Moreover, it is under an obligation to prevent and punish all acts of sexual violence against women and children. In light of their peremptory character, these obligations also apply to non-state actors. Widespread or systematic abuse of women and children would constitute a crime against humanity under international criminal law.

International humanitarian law prohibits making civilian populations, including those residing in UNMISS PoC sites, the object of attack. No party to the conflict can justify attacking a UNMISS PoC site on the basis of military necessity, since this will necessarily violate the core principles of distinction and proportionality. Moreover, parties to the conflict must authorise relief organisations to provide food and medical supplies to populations suffering undue hardship, such as those residing in UNMISS PoC sites. Refusal to grant authorisation to such relief action would constitute a violation of the prohibition on starvation of civilians as a method of combat. Grave breaches of these norms could be considered war crimes under international criminal law. In line with UN policy, UNMISS must facilitate the work of relief organisations which are humanitarian and impartial in character and are conducted without any adverse distinction.

Under the international law on displacement, all parties to the conflict are bound to safeguard and maintain the civilian and humanitarian character of the UNMISS PoC sites. This could be interpreted as obliging parties to refrain from entering the sites without the consent of

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82 See Principles 10(1) and 11(2) Guiding Principles.
83 Art 4(1)(f) ICGLR Protocol on IDPs. See also Art 5(1) and 9(2)(a)-(b) Kampala Convention; Principle 10(1) and 18 Guiding Principles; Principle 8(1) Pinheiro Principles
84 See Art 9(2)(k)-(l) Kampala Convention; Principle 22 Guiding Principles.
85 Art 4(1)(d) ICGLR Protocol on IDPs. See also Art 9(2)(c)-(d) Kampala Convention; Principle 4(2) Guiding Principles.
86 Art 38(2) CRC.
87 Art 38(3) CRC. See also Art 7(e) Kampala Convention; Principle 13 Guiding Principles.
88 Art 4 ICGLR Protocol on Sexual Violence. See also Principle 11 Guiding Principles.
89 See Art 7(5)(e)-(f) Kampala Convention
90 Art 7(1)(g) Rome Statute.
91 Article 13(b) Additional Protocol II; this includes, in Art 14 of Additional Protocol II, a prohibition on the destruction of objects indispensable to the survival of the civilian population, such as foodstuffs, livestock and water installations. See also Art 9(1)(b)-(e) Kampala Convention; Principle 10(2) Guiding Principles; SC Res 1296 (2000), 19 April 2000, operative para 5.
93 Art 14 AP II; See AP II Commentary, para 4485, p 1479. See also Principle 10(2)(b) Guiding Principles.
95 For the obligation on the GRSS, see Art 3(9) ICGLR Protocol on IDPs; see also Art 9(2)(g) Kampala Convention. For the obligation on non-state actors, see Art 7(5)(i) Kampala Convention.
UNMISS. Furthermore, all parties must accept, respect and protect the efforts of UNMISS and humanitarian actors to provide protection and assistance to internally displaced persons. In particular, the GRSS must facilitate rapid and unimpeded humanitarian access and assistance and must ensure the safety and security of humanitarian personnel in areas of displacement. No party may divert humanitarian assistance for political or military reasons.

UN law remains ambiguous over the exact responsibilities of UNMISS. On the one hand, UNMISS enjoys a robust mandate to use “all necessary means” to “protect civilians under threat of physical violence” and to “maintain public safety and security within and of UNMISS protection of civilian sites”. This includes a responsibility to respond to criminal activity and other disturbances on the sites, such as civil unrest. On the other hand, the mission lacks a full “executive” mandate, which would have allowed it to exercise legislative, executive and judicial functions in lieu of state authorities. While UNMISS premises are inviolable and are “subject to the exclusive control and authority of the United Nations”, they remain part of South Sudanese territory over which only South Sudanese courts can exercise jurisdiction.

In practice, this means that UNMISS faces a discrepancy between its operational ends and mandated means, particularly when it comes to dealing with crime. UNMISS has authority to arrest individuals engaging in criminal activity on its premises and detain them for up to 48 hours, after which they would ordinarily be handed over to national authorities. However, in line with the principle of non-refoulement and the HRDDP, UNMISS cannot hand over

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96 Note that former combatants who are no longer a member of armed forces are considered civilians; see ICRC, Rule 5, Definition of civilians, ICRC Customary IHL Database, https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule5 [accessed 26 May 2015].

97 For obligations on the GRSS, Art 3(6)-(8) and (10) ICGLR Protocol on IDPs; see also Art 5(3), (6)-(10) Kampala Convention. For obligations on non-state actors, see Art 7(5)(b) and (g)-(h) Kampala Convention. See also Principle 25(2)-(3) and 26 Guiding Principles; SC Res 1265 (1999), 17 September 1999, operative para 7.

98 Art 3(6) ICGLR Protocol on IDPs. See also Arts 3(1)(j) and 5(5)-(7) Kampala Convention; Principle 25 and 26 Guiding Principles.


101 In this sense, UNMISS PoC sites differ from “safe areas” such as those under the protection of UNPROFOR in the mid 1990s. UNPROFOR was merely mandated to deter attacks and monitor and promote cease-fire arrangements. Moreover, it could only use “all necessary measures” in self-defence. See SC Res 836 (1993), operative para 5; and SC Res 836 (1993), operative para 9. Furthermore, in contrast to UNMISS PoC sites, UNPROFOR “safe areas” were established outside UN premises. See Damian Lilly, “Protection of Civilians sites: a new type of displacement settlement? “ 62 Humanitarian Exchange Magazine (2014), http://www.odihpn.org/humanitarian-exchange-magazine/issue-62/protection-of-civilians-sites-a-new-type-of-displacement-settlement [accessed 20 May 2015].


103 Para 16 SOFA. This means that the GRSS cannot exercise executive jurisdiction over UNMISS premises, for example by sending in police or military forces without the consent of UNMISS.

104 DPKO/DFS Interim Standard Operating Procedures, Detention in United Nations Peace Operations, Ref 2010.6, para 73. Individuals may be detained for another 24 hours if they are in transit or in the process of being handed over to the national authorities. If national authorities so request or if the mission has a specific mandate to assist national law enforcement authorities in the apprehension and detention of criminals, detained persons may be kept in custody for more than 72 hours; see ibid para 74.
detainees where there are substantial grounds to believe that there is a real risk the detained person will be tortured or ill-treated, persecuted, subjected to the death penalty or arbitrarily deprived of life. In such cases, UN policy dictates that the detained persons ought to be released.

Since those within UNMISS PoC sites have often fled national authorities out of fear of persecution and cannot be handed over to them, UNMISS is left with few options. In case of minor crimes, it may decide to release detainees who do not pose a threat to public safety and security back into the UNMISS PoC sites. Where serious crimes are involved, it could expel offenders from the sites, as long as expulsion does not endanger their life or health. Alternatively, UNMISS could seek ad hoc arrangements with relevant authorities to ensure that detainees transferred to them are treated in accordance with international norms; yet such arrangements are time-consuming to negotiate and difficult to enforce. UNMISS could also interpret its mandate to “use all necessary means … to maintain public safety and security” more broadly to allow for prolonged detention. However, this would go against established UN policy and put a strain on the limited holding facilities available.

UNMISS also has a responsibility to protect the sites from external threats. In particular, it must respond to incursions of armed forces into the sites, since these challenge the civilian and humanitarian character of the sites and, in case of government forces, its inviolability. According to UN policy, UNMISS must take a proactive stance against external threats: “missions do not engage in protection only in reaction to an attack.” In addition, UNMISS must prevent the sites from becoming legitimate military targets. In this regard, it must ensure that no belligerent party uses the site to stockpile arms, recruit fighters, plan and/or prepare attacks or to engage in any sort of military operation.

2. Transfer and return of persons from UNMISS PoC sites

International law recognises the right of displaced persons to return in safety and dignity to their homes or places of habitual residence, to relocate to a different destination or to locally integrate. It generally prohibits forcible transfer, demanding that any transfer of populations where is based on the free, informed and individual consent of those involved. International and humanitarian organizations may facilitate voluntary return, relocation or integration as long as these efforts respect all rights of displaced persons and those living in areas of intended settlement and do not violate the principle of non-refoulement.

In light of the right to freedom of movement, all efforts to return, relocate or reintegrate displaced populations must enjoy their consent. Transfers may only take place when based on the free, voluntary and informed choice of individuals involved, who must be allowed to

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105 Ibid, para 80
106 Ibid.
108 See Principles 14, 15 and 28 Guiding Principles; Principle 10 Pinheiro Principles
109 Art 4(1)(g) ICGLR Protocol on the Protection of IDPs; Art 4.3-4 Cessation of Hostilities Agreement; Art 15(4) CEDAW. See also Art 13(1) UDHR; Arts 9(2)(e)-(f) and 11(1)-(2) Kampala Convention; Principle 14 Guiding Principles; Principle 7 Pinheiro Principles. For obligations on non-state actors, see Art 7(5)(d) Kampala Convention.
participate in its planning and management.\textsuperscript{110} Restrictions on the freedom of movement must be provided for by law; serve a legitimate aim, for example safeguarding security, public order, public health or morals or protecting the rights and freedoms of others; and must not violate other human rights.\textsuperscript{111}

Transfers must fully respect all other international human rights of both the transferees and those living in the destinations of transfer.\textsuperscript{112} In particular, transfers are prohibited where they result in the direct or indirect discrimination of particular individuals or groups on the basis of, \textit{inter alia}, their descent or ethnicity, for example by depriving them from livelihoods or exposing them to danger.\textsuperscript{113} Moreover, authorities and entities involved in transfers must ensure that affected populations, including those already living in transfer destinations, enjoy adequate standards of living, particularly with regard to housing, food and sanitation.\textsuperscript{114} When persons or populations voluntarily choose to transfer or return, authorities must ensure to keep families together\textsuperscript{115} and not to separate children from their parents.\textsuperscript{116}

According to a UN expert group on human right and population transfer, “[p]ractices and polices having the purpose or effect of changing the demographic composition of the region in which a national, ethnic, linguistic, or other minority or an indigenous population is residing, whether by deportation, displacement, and/or the implantation of settlers, or a combination thereof, are unlawful.”\textsuperscript{117} In turn, the 2009 Kampala Convention prohibits “(d)isplacement based on policies of racial discrimination or other similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the population.”\textsuperscript{118} These statements principally apply to forcible displacement by parties to the conflict with the intention to alter demographics, a practice that is sometimes referred to as “ethnic cleansing”. They do not directly apply to efforts by third parties to support voluntary relocation. However, if UNMISS has substantial grounds for believing that there is a real risk that any population transfers it is involved in support a pre-mediated effort by any side of the conflict to alter the demographic composition of parts of the country, the HRDDP demands that it must immediately cease support to such transfers.

International humanitarian law prohibits parties to the conflict from forcibly moving populations, unless the security of civilians or imperative military reasons so demand and all possible measures have been taken to ensure that the civilian population receives satisfactory

\textsuperscript{110} See Art 11(2) Kampala Convention; Principle 28(2) Guiding Principles.
\textsuperscript{111} Art 4(1)(g) ICGLR Protocol on IDPs. See also Art 12(3) ICCPR. In this regard, UNMISS may refuse admission to the UNMISS PoC sites to civilians not under the threat of physical violence, particularly when this is done to maintain public order and health within the sites.
\textsuperscript{112} See Art 4(1)(e) ICGLR Protocol on IDPs.
\textsuperscript{113} Discrimination is direct when a particular action is undertaken with intent to discriminate; it is indirect when a particular action has unintended yet discriminatory consequences.
\textsuperscript{114} Art 4(1)(d)-(e) ICGLR Protocol on IDPs. See also Principle 18 Guiding Principles; Art 25 UDHR; Art 11(1) ICESCR.
\textsuperscript{115} Art 4(1)(h) ICGLR Protocol on IDPs. See also Principle 17 Guiding Principles.
\textsuperscript{116} Art 9(1) CRC.
\textsuperscript{118} See Art 4(4)(a) Kampala Convention.
conditions of shelter, hygiene, health, safety and nutrition. In line with customary international humanitarian law, displaced persons have a right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist. This does not entail an obligation to return.

Under international criminal law, the deportation or forcible transfer of populations from areas where they are lawfully present without grounds permitted by international law constitutes a crime against humanity. In armed conflicts, ordering the displacement of civilian populations in the absence of an imperative military or security reason, amounts to a war crime.

The international law on displacement reaffirms the right of displaced persons to return to their homes and habitual places of residence, or to voluntarily resettle in another part of their country. In addition, the principle of non-refoulement holds that no person, including those residing in UNMISS PoC sites, may be returned or relocated to any place where their life, safety, liberty and/or health would be at risk. UNMISS would violate this principle if it returns or relocates persons while it has substantial grounds for believing there is a real risk that the persons involved may become the victim of violence and/or violations or abuses of international human rights and international humanitarian law.

Under tier three of its protection of civilians mandate, UNMISS is tasked to “foster a secure environment for the eventual safe and voluntary return of internally-displaced persons (IDPs) and refugees”. The mandate clearly prioritizes return to homes or places of habitual residence, although displaced persons may freely choose to be relocated to a different area. UNMISS must facilitate return “through monitoring of, ensuring the maintenance of international human rights standards by, and specific operational coordination with the police services in relevant and protection-focused tasks”. Where it cannot guarantee a secure environment, it may not induce return or relocation.

3. Housing and property: protection, restitution and compensation

International law provides displaced persons, including those residing in UNMISS PoC sites, with two levels of protections regarding the housing and property that they have had to leave behind. First, it protects against damage or loss by prohibiting pillage, destruction and illegal or arbitrary appropriation. Second, any violation of international law results in an obligation to make reparation. International law requires competent authorities to assist displaced

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119 Art 17 Additional Protocol II. While this is often interpreted as a prohibition on causing displacement in the first place, it equally applies to displaced populations that have sought refuge elsewhere, including in UNMISS PoC sites.
121 Art 7(1)(d) Rome Statute.
123 Art 5(7) ICGLR Protocol on IDPs, which obliges states to act in accordance with Section V of the Guiding Principles. See also Art 11(1)-(2) Kampala Convention; Principle 28(1) Guiding Principles; Principle 10 Pinheiro Principles.
124 See Principle 15(d) Guiding Principles.
126 See Art 28 of the International Law Commission’s Articles on the Responsibility of States for Internationally
persons in the recovery of their possessions and strongly prefers restitution to alternative forms of reparation, such as compensation.\textsuperscript{127}

International human rights law recognises a right of everyone to be free from interference or arbitrary deprivation of property,\textsuperscript{128} including arbitrary interference from one's home.\textsuperscript{129} This right may only be restricted on the basis of law and when justified in the public interest, provided that the affected individuals are duly compensated.\textsuperscript{130} The GRSS must ensure that displaced persons have access to effective remedies under domestic law to challenge any violation of these rights.\textsuperscript{131}

International humanitarian law obliges parties to the armed conflict in South Sudan to distinguish in their operations between civilian and military objects.\textsuperscript{132} In particular, parties are prohibited from committing pillage\textsuperscript{133} and from engaging in indiscriminate attacks or acts of violence against property belonging to displaced civilians.\textsuperscript{134} Such property may not be used as a military shield, become the object of reprisals or be destroyed or appropriated as a form of collective punishment.\textsuperscript{135} Any private property seized or destroyed by reason of military necessity must be returned after the conclusion of the conflict.\textsuperscript{136} If return is not possible, compensation must be provided.\textsuperscript{137}

The abovementioned obligations, as well as the 2015 Peace Agreement, vest a duty on South Sudan to investigate, prosecute and punish perpetrators of gross violations of international human rights law and serious violations of international humanitarian law that constitute international crimes.\textsuperscript{138} Where the state, through its acts or omissions, is itself responsible for such violations, it must provide reparation to the victims.\textsuperscript{139} Pillage and the destruction of property of an adversary in the absence of an imperative military necessity constitute war

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\textsuperscript{127} See Principle 2.2 of the 2005 Pinheiro Principles.
\textsuperscript{128} See Art 17(2) UDHR; Art 14 ACHPR; Principle 21(1) Guiding Principles; Art 7.1 Pinheiro Principles.
\textsuperscript{129} See Art 12 UDHR, Art 17(1) ICCPR.
\textsuperscript{130} Art 4(5)-(6) ICGLR Protocol on Property Rights. See also Art 14 ACHPR; Art 7.2 Pinheiro Principles. Public interests include land reclamation e.g. for public infrastructure works.
\textsuperscript{131} Art 4(3) ICGLR Protocol on Property Rights. See also Art 8 UDHR; Art 12(1) Kampala Convention; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("Basic Principles on Reparation"), para 11-14, 17;
\textsuperscript{133} Art 4(2)(g) AP II; Rule 52, “Pillage”, ICRC Customary IHL Database, https://www.icrc.org/customary-ihl/eng/docs/v1_cha_rule52; Art 3(2)(b) ICGLR Protocol on IDP property. See also Principle 21(2)(a).
\textsuperscript{134} Art 3(2)(b) ICGLR Protocol on Property Rights. See also Principle 21(2)(b) Guiding Principles.
\textsuperscript{135} Art 3(2)(c)-(e) ICGLR Protocol on Property Rights. See also Principle 21(2)(c)-(e) Guiding Principles.
\textsuperscript{137} Ibid.
\textsuperscript{138} Art 8-12 ICGLR Protocol on International Crimes. See also para 4, Basic Principles on Reparation.
\textsuperscript{139} See Para 15, 19-23 Basic Principles on Reparation.
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crimes under international criminal law.\textsuperscript{140} In proceedings under the Rome Statute, those found responsible for international crimes may be ordered to provide reparation to their victims.\textsuperscript{141}

The international law on displacement builds on the norms mentioned above. First, it imposes on South Sudanese authorities a positive duty to protect property and possessions left behind by internally against destruction and arbitrary and illegal appropriation, occupation or use.\textsuperscript{142} Second, it demands that competent authorities assist returned or resettled persons to recover their property and possessions, or to obtain appropriate compensation when recovery is not possible.\textsuperscript{143} This includes establishing legislation, institutions and formal and informal mechanisms to bring claims for restitution or compensation.\textsuperscript{144} It also requires the GRSS to create an affordable property registration schemes\textsuperscript{145} and to allow humanitarian organizations rapid and unimpeded access to assist displaced persons in return or resettlement and reintegration.\textsuperscript{146} Third, where the GRSS is directly responsible for damage or loss to property, it is required to provide compensation.\textsuperscript{147} Claims regarding loss or damage of property of displaced persons do not expire.\textsuperscript{148}

South Sudanese authorities must give special protection to returning spouses, single parents and single women;\textsuperscript{149} children, orphans, children born out of wedlock and adopted children;\textsuperscript{150} and communities, pastoralists and other communities whose livelihood depends on a special attachment to their lands.\textsuperscript{151} They should ensure free and equal access for all to institutions and mechanisms regarding restitution and compensation;\textsuperscript{152} disseminate information about these institutions and mechanisms;\textsuperscript{153} and provide legal aid where required.\textsuperscript{154} Affected persons should be consulted about and represented in restitution and compensation programs.\textsuperscript{155} Where states are not able to provide effective mechanisms themselves, they should request the technical assistance of international agencies.\textsuperscript{156}

\begin{footnotesize}
\begin{enumerate}
\item[140] Art 8(2)(e)(v) and (xii) of the Rome Statute respectively.
\item[141] Art 75 Rome Statute.
\item[142] Art 13 ICGLR Pact; Arts 3(3) and 4(4) ICGLR Protocol on Property Rights, which refer to the Pinheiro Principles and bind successive governments respectively. See also Art 9(2)(i) Kampala Convention; Principle 21(3) Guiding Principles.
\item[143] Art 13 ICGLR Pact; Art 4 and 8(2) ICGLR Protocol on Property Rights. See also Art 12(1)-(2) Kampala Convention Principle 29(2) Guiding Principles; Principle 12.1, 12.3 Pinheiro Principles.
\item[144] Art 4(3)(a)-(c) ICGLR Protocol on Property Rights. See also Arts 11(4) and 12(1)-(2) Kampala Convention; Pinheiro principle 12, 18.
\item[145] Art 4(3)(d) and 8(2)-(3) ICGLR Protocol on Property Rights.
\item[146] See Art 11(3) Kampala Convention; Principle 30 Guiding Principles.
\item[147] Art 8(1) ICGLR Protocol on Property Rights. See also Art 12(3) Kampala Convention.
\item[148] Art 3(5) ICGLR Protocol on Property Rights.
\item[149] Art 5 ICGLR Protocol on Property Rights. This includes ensuring legal capacity of women to register, own and inherit land.
\item[150] Ibid, Art 6. This includes ensuring that children can inherit land and designing legislation that adheres to the principle of the best interest of the child.
\item[151] Ibid Art 7; Art 4(1)(c) ICGLR Protocol on IDPs.
\item[152] See Principle 31.1 Pinheiro Principles.
\item[153] See ibid, Principle 13.9.
\item[154] See ibid, Principle 13.11.
\item[155] See ibid, Principle 14.
\item[156] See ibid, Principle 12.5; Art 11(3) Kampala Convention.
\end{enumerate}
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Various mechanisms have been developed to implement housing and property restitution and compensation in post-conflict situations. Some of these mechanisms can be found in peace treaties. For example, Annex 7 of the Dayton Peace Agreement, ending the war in Bosnia-Herzegovina in the 1990s, established the Commission for Real Property Claims of Displaced Persons and Refugees (“CRPC”). In line with its mandate, between 1996 and 2003 the CRPC issued over 300,000 decisions in relation to individual claims. It also assisted with their implementation and contributed to property law reform. The “CRPC certificates”, issued by the Commission to those who applied to regain their property over time evolved into a document that carried the full force of law.

In situations where UN peacekeeping operations have enjoyed an “executive” mandate, they have been actively involved in land, housing and property schemes. In Kosovo, UNMIK established, administered and managed the Kosovo Housing and Property Directorate (“HPD”) and Housing and Property Claims Commission (“HPCC”). The HPD, facilitated by UN-Habitat, collected claims and sought mediated settlements or referred them to the quasi-judicial HPCC for a binding decision. The HPCC, consisting of one national and two international Commissioners, enjoyed exclusive jurisdiction over a limited category of residential property claims and operated as a self-contained regime outside the domestic legal system. In 2006, the responsibilities of the HPD were transferred to the Kosovo Property Agency, and independent body under Article 11.2 of the Constitutional Framework of Kosovo.

By contrast, in East Timor the UNTAET Land and Property Unit (“LPU”) was not authorized to administer land and property claims, but could only file and record them. While the LPU developed detailed proposals for institutionally addressing restitution questions, few of these were adopted and many issues remained unresolved. Some have suggested that UNTAET’s inability to deal with housing issues contributed to a renewed outbreak of violence in Dili in 2006.

In situations where UN peacekeeping missions have not prioritised housing, land and property issues, either due to a lack of a mandate or lack of capacity, other organisations have

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159 Ibid.
162 UNMIK Regulation No 2006/10, On the resolution of claims relating to private immovable property, including agricultural and commercial property, UNMIK/REG/2006/10, 4 March 2006, [accessed 26 May 2015].
164 Ibid, p. 112.
often stepped in. In Cambodia, the United Nations High Commissioner (UNHCR) took the lead, initially offering returnees land in a region of their choice. However, facing opposition from local authorities, it eventually gave up on its free choice guarantee, prioritizing individuals who were willing to return to their places of origin and could be accommodated by their family.\textsuperscript{165} In Afghanistan, land and property disputes have mostly been left to local and customary authorities, particularly after the collapse of the Special Property Disputes Resolution Court that had been established by the government.\textsuperscript{166} The UNHCR and the Norwegian Refugee Council (NRC) did set up a network of information and legal aid centres and actively intervened in or mediated property disputes.\textsuperscript{167}

4. Accountability

Accountability is a broad term that encompasses both legally binding procedures and non-binding mechanisms to hold institutions and individuals to account for their actions. From the perspective of international law, a distinction must be made between mechanisms addressing i) state responsibility; ii) individual responsibility; and iii) responsibility of UNMISS and its members.

As a preliminary observation, while this report does not deal with domestic accountability mechanisms it is worth noting that, according to the Transitional Constitution, all rights and freedoms enshrined in international human rights treaties ratified or acceded to by South Sudan constitute an integral part of the Bill of Rights of the RSS.\textsuperscript{168} Domestic mechanisms to implement the Bill of Rights may thus be used to enforce South Sudan's human rights treaty obligations. Moreover, the GRSS should ensure that non-state actors operating within South Sudan are held to account under domestic law.\textsuperscript{169}

i) State responsibility

International law offers various mechanisms to monitor and enforce compliance of the GRSS with international obligations, including monitoring mechanisms, non-binding individual communication procedures to state-to-state judicial procedures.

In addition, the situation in South Sudan has international legal implications for third states. International law demands that all states cooperate to bring to an end, through lawful means, any serious breach of peremptory norms of international law, such as gross violations of


\textsuperscript{167} See Ingunn Sofie Aursnes and Conor Foley, Property restitution in practice: The Norwegian Refugee Council’s experience, April 2005, p. 10-13, http://www.globalprotectioncluster.org/_assets/files/tools_and_guidance/housing_land_property/By%20Themes/HLP%20Restitution/Property_Restitution_in_Practice_2005_EN.pdf [accessed 26 May 2015]. This was part of NRC’s Information Counselling and Legal Assistance programs (ICLA), which have operated in more than a dozen countries in the world. See ibid, p. 2.

\textsuperscript{168} Art 9(3) Transitional Constitution of the Republic of South Sudan.

\textsuperscript{169} See Arts 3(1)(h), 5(11) and 7(4) Kampala Convention.
international human rights law and serious violations of international humanitarian law.\textsuperscript{170} No state may recognise as lawful a situation created by such breaches, nor render aid or assistance in maintaining that situation.\textsuperscript{171}

\textit{a) Monitoring mechanisms}

Under the CRC, the CEDAW and the CAT, the GRSS is obliged to submit to the UN Secretary-General, within one or two years of ratification, reports on the measures it has adopted to give effect to the provisions of the conventions and on the progress it has made in this respect.\textsuperscript{172} These reports will be considered by the conventions’ committees, who may share their general comments with the GRSS.\textsuperscript{173} The Committee may also report their general comments to the UN General Assembly.\textsuperscript{174} The general comments of the committees are not legally binding, but can be treated as authoritative interpretations of the obligations under the conventions.

If the CEDAW or the CAT committee receives reliable information concerning grave or systematic violations of the CEDAW or the CAT, it must invite the relevant state party to submit observations.\textsuperscript{175} On the basis of the available information, the respective committee may designate one or more of its members to conduct an inquiry.\textsuperscript{176} Upon consideration of the findings of the inquiry, the Committee may issue confidential, non-binding comments and recommendations to the state party concerned.\textsuperscript{177}

Some of the Protocols to the 2006 ICGLR Pact provide for monitoring mechanisms, although little information is available about whether these have actually been established, how they work and what they have achieved. The ICGLR Protocol on the Property Rights refers to a Sub-Committee of Experts established under the Coordinating Committee of the Programme of Action on Humanitarian, Social and Environmental Issues, which has specific responsibility for land and property issues.\textsuperscript{178} The ICGLR Protocol on International Crimes establishes a Committee\textsuperscript{179} tasked to review and monitor situations in member states; make suggestions and recommendations on the prevention of crimes, the fight against impunity and the rights of victims; and contribute to raising awareness and education on peace and reconciliation.\textsuperscript{180} The Committee is to submit reports on its activities to the Inter-Ministerial Committee.\textsuperscript{181} Finally, the ICGLR Protocol on IDPs calls for the establishment of a regional mechanism for monitoring the protection of internally displaced persons, although it does not provide further guidance on the role and procedures of this body.\textsuperscript{182}

\textsuperscript{170} See Art 41(1) ARSIWA.
\textsuperscript{171} See Art 41(2) ARSIWA.
\textsuperscript{172} Art 44(1) CRC (two years); Art 18 CEDAW (one year); Art 19(1) CAT (one year).
\textsuperscript{173} Art 20(1) CEDAW; Art 19(3) CAT. Under Art 19(2) of the CAT, the Secretary-General transmits the reports to all state parties of the convention.
\textsuperscript{174} Art 44(5) CRC; Art 21(1) CEDAW; Art 19(4) CAT.
\textsuperscript{175} Art 8(1) CEDAW Optional Protocol; Art 20(1) CAT.
\textsuperscript{176} Art 8(2) CEDAW Optional Protocol; Art 20(2) CAT.
\textsuperscript{177} Art 8(3) CEDAW Optional Protocol; Art 20(4)-(5) CAT.
\textsuperscript{178} Art 9(1) ICGLR Protocol on Property Rights.
\textsuperscript{179} Art 26 ICGLR Protocol on International Crimes.
\textsuperscript{180} Ibid, Art 38(2).
\textsuperscript{181} Ibid, Art 42.
\textsuperscript{182} Art 4(1)(j) ICGLR Protocol on IDPs.
The AU established a Commission of Inquiry on South Sudan on 6 March 2014, to investigate human rights violations and other abuses of international law in South Sudan following the outbreak of violence on 15 December 2013. The Commission submitted its report to the AU’s Peace and Security Council on 29 January 2015, but the report was not released publicly until 27 October 2015.\textsuperscript{183} In addition to numerous findings and recommendations on judiciary and governance systems, the final report of the AU’s Commission of Inquiry on South Sudan found violations of “the right to life”, “prohibition of torture and freedom and security of the person”, “women and girls including acts of rape and sexual violence”, “property: through looting and destruction of property” and “children, including: the right to education, due to closure or occupation of schools by armed fighters…the recruitment and use of children in hostilities by the warring parties contravenes customary international human rights law.”\textsuperscript{184}

An additional monitoring mechanism was established through the 2015 Peace Agreement, known as the Ceasefire and Transitional Security Arrangement Monitoring Mechanism (CTSAMM).\textsuperscript{185} The mechanism, chaired by IGAD and comprised of international monitors, replaces the IGAD Monitoring and Verification Mechanism (MVM) and is responsible for monitoring compliance to the permanent ceasefire and implementation of transitional security arrangements.\textsuperscript{186}

The United Nations Human Rights Council can establish “Special Procedures” to monitor the human rights situation in a particular country, by mandating a Special Rapporteur, Independent Expert or Working Group to undertake country visits, act on individual cases by sending out communications, convene expert consultations, engage in advocacy and awareness-raising and provide advice and technical assistance.\textsuperscript{187} Currently there is no Special Procedure dedicated to the situation of South Sudan.\textsuperscript{188} The UN Special Rapporteur on the human rights of internally displaced persons visited South Sudan last in November 2013, shortly before the outbreak of hostilities.\textsuperscript{189}

\textit{b) Individual communications}

As a party to the Optional Protocol to the CEDAW, South Sudan has recognised the competence of the CEDAW Committee to receive and consider communications submitted by or on behalf of individuals or groups of individuals claiming to be a victim of a violation of any of the rights set out in the CEDAW.\textsuperscript{190} Upon examination of the communication, the Committee may issue confidential, non-binding views and recommendations to the parties concerned.\textsuperscript{191}


\textsuperscript{184} AU Commission of Inquiry on South Sudan (2015): Chapter V (C. On Examination of Human Rights Violations, Other Abuses and Accountability)1125 (h-l).

\textsuperscript{185} Chapter II (4) 2015 Peace Agreement.

\textsuperscript{186} Chapter II (4.1-4.3) 2015 Peace Agreement.


\textsuperscript{188} For an overview of Special Procedures, see http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx [accessed 20 May 2015].

\textsuperscript{189} See Report of the Special Rapporteur on the human rights of internally displaced persons, Chaloka Beyani, Mission to South Sudan, 12 May 2014, UN Doc A/HRC/26/33/Add.3.

\textsuperscript{190} Art 1-2 CEDAW Optional Protocol.

\textsuperscript{191} Ibid, Art 7(3).
South Sudan has not made a declaration under the CAT recognizing the competence of its Committee to receive and consider individual communications,\(^{192}\) neither has it signed or ratified the Optional Protocol to the Convention on the Rights of the Child on a communications procedure.\(^{193}\)

c) State-to-state judicial procedures
States may invoke the responsibility of South Sudan for violations of international law in international judicial procedures. While South Sudan has not accepted the compulsory jurisdiction of the International Court of Justice (“ICJ”), there are several ways in which international courts or tribunals could exercise jurisdiction over South Sudan.

First, state parties to the CEDAW and the CAT may challenge South Sudan’s interpretation and application of these conventions.\(^{194}\) If the dispute cannot be settled through negotiation, it may be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of the parties to the dispute may refer the matter to the ICJ.\(^{195}\)

Second, South Sudan may accept the jurisdiction of the ICJ on an ad hoc basis, for example through concluding a special agreement (compromis) with another state or by accepting jurisdiction subsequent to the initiation of proceedings against it (forum prorogatum).\(^{196}\) In neither of these cases, however, is South Sudan obliged by international law to accept the jurisdiction of the ICJ.

At the regional level, the 2006 ICGLR Pact provides that member states may submit any dispute which may arise between them in relation to the interpretation or application of all or part of the Pact, including its Protocols, to the African Court of Justice, provided that alternative means to settle the dispute peacefully, such as negotiation, mediation and conciliation, have failed.\(^{197}\) The African Court of Justice, however, has never been established and is to be superseded by the planned African Court of Justice and Human Rights.\(^{198}\)

ii) Individual responsibility

a) Sanctions
On 3 March 2015, the UN Security Council established a travel ban and asset freeze for individuals and entities designated by the newly established South Sudan Sanctions Committee (“2206 Committee”).\(^{199}\) Decisions of the Committee are binding on UN member states due to its Chapter VII mandate. On 1 July 2015, the Committee approved the addition of six names to its List of Individuals and entities subject to the travel ban asset freeze. The

\(^{192}\) See Art 22(1) CAT.
\(^{193}\) Concluded 19 December 2011, not yet in force.
\(^{194}\) Art 29(1) CEDAW; Art 30(1) CAT.
\(^{195}\) Art 29 CEDAW; Art 30 CAT.
\(^{196}\) See generally Art 36(1) of the ICJ Statute.
\(^{197}\) Art 29 ICGLRPact.
\(^{198}\) See Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008 (not yet in force).
Committee is assisted by a Panel of Experts, which presented a confidential final report on 14 January 2016 to the Committee. Though the final report of the panel was not made public, media reported that it includes the following language: “There is clear and convincing evidence that the majority of acts committed in the course of the war, including the targeting of civilians and violations of international humanitarian law and international human rights law, have been directed by or undertaken with the knowledge of senior individuals in the highest level of government and within the opposition.” On 2 March 2016 both the mandate of the Panel of Experts and the South Sudan sanctions regime expire. The UN Security Council is currently considering adopting a resolution to renew the regime and the mandate.

b) Individual criminal responsibility

Individual criminal responsibility can be implemented in various ways. First, the UN Security Council could refer the situation of South Sudan to the Prosecutor of the International Criminal Court (“ICC”) under Chapter VII of the UN Charter. This would allow the ICC to prosecute anyone involved in the conflict in South Sudan, including the president. The advantage of this approach is that the ICC has all procedures and mechanisms in place to conduct investigations and prosecutions. On the other hand, the institution is seen as highly politicised and referral of another African country would feed allegations that the Court is biased against the continent.

The UN Security Council could act under Chapter VII of the UN Charter to establish a new international criminal tribunal as its subsidiary organ. Both the International Criminal Tribunal for Rwanda (“ICTR”) and the International Criminal Tribunal for the former Yugoslavia (“ICTY”) were founded this way. While these tribunals have given a significant impetus to the development of international criminal law, this approach is generally considered as expensive and time-consuming.

The 2015 Peace Agreement provides for the creation of the Hybrid Court of South Sudan (HCSS), to be established by the African Union Commission to “investigate and prosecute individuals bearing the responsibility for violations of international law and/or applicable South Sudanese law, committed from 15 December 2013 through the end of the Transitional Period.” On 26 September 2015, the heads of state of the African Union’s Peace and Security Council released the details of the AU’s Commission of Inquiry report and took on board the recommendation of establishing an independent hybrid court to investigate and prosecute human rights abuses. The HCSS would have jurisdiction over genocide, crimes

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200 Letter dated 27 April 2015 from the Secretary-General addressed to the President of the Security Council, 27 April 2015, UN Doc S/2015/287.
204 Article 13(b) of the Rome Statute.
205 Art 27 Rome Statute.
206 Chapter V (3) of the 2015 Peace Agreement.
207 Communiqué of 547th meeting Peace and Security Council of the African Union, 547th meeting, 26 September 2015, 22 (ii)(a)
against humanity, war crimes and “other serious crimes under international law and relevant laws of the Republic of South Sudan including gender based crimes and sexual violence.”

The 2015 Peace Agreement specifies that the HCSS would be independent and distinct from the national judiciary, carry out its own investigations and have primacy over any national courts of South Sudan. While the HCSS is yet to be established, it is not unprecedented: in 2012 the AU and Senegal established a hybrid court along a similar model, the Extraordinary African Chambers within the courts of Senegal, which started its prosecution of Hissène Habré, the former dictator of Chad, for international crimes in July 2015.

Another possibility is to encourage prosecutions by states that have established universal jurisdiction over international crimes in their domestic legal system. In these states, domestic courts can prosecute individuals for international crimes regardless of where they have been committed. There are two caveats: first, international law extends full immunity from prosecution to certain high-ranking state officials of South Sudan, such as the head of state and the minister of foreign affairs, although these officials can be prosecuted for their acts when they leave office. Second, domestic courts can often only prosecute individuals who are physically present on the territory of that state. By avoiding travel to countries that exercise universal jurisdiction, perpetrators may avoid prosecution in the courts of these countries.

**iii) Responsibility of UNMISS and its members**

UNMISS and its members generally enjoy immunity in the courts of South Sudan. While this immunity is not meant to shield UNMISS from responsibility for its actions, alternative mechanisms to hold UNMISS and its members to account have significant limitations.

With regard to UNMISS, the SOFA provides that disputes and claims of a private character, not resulting from operational necessity, are to be resolved through a standing claims commission jointly appointed by the UN Secretary-General and the GRSS. While UN SOFAs routinely provide for a standing claims commission, in the history of UN peacekeeping none has ever been established.

Rather, third party claims (i.e. claims of private individuals) are dealt with through local claims review boards that constitute an integral part of the mission. The UN has developed a

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208 Art 3.2.1 2015 Peace Agreement.
209 Ibid, Art 3.2.2.
210 See Agreement between the Government of the Republic of Senegal and the African Union on the Establishment of Extraordinary African Chambers within the Senegalese Judicial System, 22 August 2012, http://legal.au.int/en/sites/default/files/Agreement%20AU-Senegal%20establishing%20AEC-english_0.pdf [accessed 27 May 2015]. Examples of other hybrid courts include the Serious Crimes Panels in the District Court of Dili in East Timor; the Regulation 64 Panels in the courts of Kosovo; the Special Court for Sierra Leone; the Extraordinary Chambers in the Courts of Cambodia; the Special Tribunal for Lebanon; and the proposed Special Criminal Court in the Central African Republic.
213 Para 15 and 50 SOFA.
214 Para 55 SOFA.
special regime for third party claims.\textsuperscript{215} Claims must be submitted within six months from the
time of damage, injury or loss and must be limited to economic loss, with a maximum
amount of $50,000.\textsuperscript{216} Specific rules apply to the compensation for non-consensual use, loss
or damage of premises.\textsuperscript{217} The UN does not accept liability for claims arising from
“operational necessity”, i.e. necessary actions taken by a peacekeeping force in the course of
carrying out its operations in pursuance of its mandates.\textsuperscript{218}

Individual members of UNMISS are immune from legal process for all acts done in their
official capacity.\textsuperscript{219} In case of crimes committed by civilian members of UNMISS, the GRSS
and the Special Representative are to agree whether or not criminal proceedings should be
instituted.\textsuperscript{220} Military members of the military component of UNMISS are only to be
prosecuted by the domestic courts of the sending country.\textsuperscript{221}

In exceptional cases, troop contributing countries to peacekeeping missions may be held
responsible for acts or omissions of their contingents. In 2013 and 2014, Dutch courts found
that the Netherlands was responsible for the deaths of several hundred Bosnians in the 1995
Srebrenica massacre, since the Dutch government exercised “effective control” (i.e. factual
control) over its troops that were formally under UN command.\textsuperscript{222} While this is an important
precedent, no international courts or tribunals have expressed views on this matter.

\textsuperscript{215} See GA Res 52/247, 26 June 1998 (“Third-party liability: temporal and financial limitations”). See also
Secretary General, Administrative and budgetary aspects of the financing of the United Nations peacekeeping
operations, 21 May 1997, UN Doc A/51/903 and Secretary General, “Administrative and budgetary aspects of
\textsuperscript{216} GA Res 52/247, operative para 8 and 9 respectively.
\textsuperscript{217} GA Res 52/247, operative para 10.
\textsuperscript{218} See GA Res 52/247, operative para 6; Secretary General, “Administrative and budgetary aspects of the financing
\textsuperscript{219} Para 50 SOFA.
\textsuperscript{220} Para 51(a) SOFA.
\textsuperscript{221} Para 51(b) SOFA.
\textsuperscript{222} See The Netherlands v. Nuanovic, Supreme Court of the Netherlands, 6 September 2013,
[accessed 8 June 2015]; Mothers of Srebrenica v. the Netherlands, The Hague District Court, 16 July 2014,